

STATE OF ALASKA  
DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

IBLA 90-321

Decided October 25, 1994

Appeal from a decision of the Alaska State Office, Bureau of Land Management, modifying in part a prior decision and holding right-of-way A-067674 null and void in part. AA-6714.

Reversed.

1. Alaska: Native Allotments--Evidence: Presumptions

A Native allotment application bearing a BLM date-stamp of Dec. 27, 1971, and a BIA certification of Dec. 22, 1971, will be regarded as timely filed prior to the Dec. 18, 1971, deadline imposed by sec. 18(a) of ANSCA, 43 U.S.C. § 1617(a) (1988), where the record supports a finding that the application was timely filed with BIA. An affidavit of an individual who states that she assisted the applicant in completing the application on Dec. 31, 1970, and regularly mailed such applications within a few weeks of completion; evidence that applications were not routinely date-stamped upon receipt by BIA; and the fact that the application bears a metes and bounds description of the allotment parcel, coupled with the fact that such descriptions were generally prepared by BIA officials, supports a finding that the application was timely filed.

2. Alaska: Native Allotments

Prior to passage of sec. 905(a)(3) of ANILCA, 43 U.S.C. § 1634(a)(3) (1988), lands containing valuable deposits of gravel were considered to be mineral lands unavailable for Native allotment. The preference right which vests upon the completion of 5 years of qualifying use and occupancy and the timely filing of an application for a Native allotment will not relate back to the initiation of use and occupancy to preempt an intervening material site right-of-way for gravel when mineral lands were unavailable for allotment at the time.

3. Alaska National Interest Lands Conservation Act: Native Allotments--  
Alaska: Native Allotments

Statutory approval of a Native allotment pursuant to sec. 905 of ANILCA, 43 U.S.C. § 1634 (1988), is subject to valid existing rights, including a prior material site right-of-way issued for mineral lands. A decision declaring such a right-of-way null and void to the extent the lands are embraced in a Native allotment is properly reversed on appeal.

APPEARANCES: E. John Athens, Jr., Esq., Office of the Attorney General, State of Alaska, Fairbanks, Alaska, for appellant; James J. Benedetto, Esq., Anchorage, Alaska, for Mary Sanford; Roger L. Hudson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The State of Alaska, Department of Transportation and Public Facilities, has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 27, 1990, modifying in part a BLM decision of February 5, 1985, and holding right-of-way A-067674 null and void in part. The prior BLM decision had held that Native allotment application AA-6714 was legislatively approved by section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1988), subject to right-of-way A-067674. At issue in the instant appeal is whether BLM properly concluded in the most recent decision that right-of-way A-067674 was null and void insofar as it described lands within the Native allotment.

Mary Sanford signed Native allotment application AA-6714 on December 31, 1970, seeking an allotment of approximately 160 acres of land in protracted secs. 9 and 10, T. 7 N., R. 2 E., Copper River Meridian. <sup>1/</sup> This application was made pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 (1970), repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1988), subject to applications pending on that date. Sanford alleged use and occupancy of the lands sought commencing in May 1965.

On December 22, 1971, Roy Peratrovitch, the Anchorage Area Superintendent, Bureau of Indian Affairs (BIA), signed application AA-6714 certifying that Mary Sanford was a "native entitled to an allotment" and that she "had occupied, marked, and posted the lands" claimed by her. BIA forwarded this application to BLM, as evidenced by a datestamp on the front of the application indicating receipt by BLM on December 27, 1971.

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<sup>1/</sup> Lands within Native allotment application AA-6714 were surveyed in July 1988, and this survey (U.S. Survey 9637) was filed in March 1990. The survey fixed the allotment approximately 920 feet west of the boundaries previously relied upon by appellant.

Previous to the filing of Sanford's allotment application, BLM issued right-of-way A-067674 to the State on July 26, 1966, to serve as a mineral material source for highway construction. The grant was made pursuant to the Act of August 27, 1958, 23 U.S.C. § 317 (1988). An application for right-of-way A-067674 had been filed by the State on April 28, 1966.

Although the bulk of the State's appeal addresses BLM's holding that right-of-way A-067674 was null and void in part, the State first focusses upon the jurisdiction of this Department to consider Native allotment application AA-6714. The State charges that this application was not timely filed and that, therefore, it must be rejected as a matter of law. The State argues that the fact BLM recognized this application as legislatively approved by decision of February 5, 1985, does not now preclude appellant from raising the issue that the Department is without jurisdiction.

In support, the State correctly notes that the deadline for filing Native allotment applications was December 18, 1971, and that BLM did not receive application AA-6714 until December 27, 1971. Appellant also cites with approval Assistant Secretary Horton's interpretation of the savings clause for pending applications found at section 18(a) of ANCSA, quoted by the Board in Ouzinkie Native Corp. v. Opheim, 83 IBLA 225, 228 (1984):

This phrase [pending before the Department on December 18, 1971] is interpreted as meaning that an application for a Native allotment must have been on file in any bureau, division, or agency of the Department of the Interior on or before December 18, 1971. The Department has no authority to consider any application not filed with any bureau, division, or agency of the Department of the Interior on or before said date. Evidence of pendency before the Department of the Interior on or before December 18, 1971, shall be satisfied by any bureau, agency, or division time stamp, the affidavit of any bureau, division, or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971. [Emphasis in original.]

Appellant argues that no datestamp or affidavit satisfying these specific requirements is present in the record.

In response, Sanford offers the affidavit of Lillian Boston, which states that Boston personally assisted Mary Sanford and others in preparing Native allotment applications and witnessed Sanford's signature on December 31, 1970. Boston further states that she was aware in 1970 that the Native Allotment Act might be repealed by future legislation and that, therefore, time was of the essence in delivering allotment applications to BIA in Anchorage as soon as possible. It was her normal practice, Boston says, to mail completed applications to BIA Anchorage on a regular basis.

Although she did not have any recollection of when Mary Sanford's application was mailed, Boston states that her best estimate is that "if the application was signed on December 31, 1970, that it would have been no more than a few weeks before the application was mailed to BIA in Anchorage."

[1] We find the Boston affidavit to evidence a practice, akin to a business practice, that completed applications were mailed by Boston to BIA within a few weeks of completion. See 1 McCormick on Evidence 829 (4th ed. 1992). Although the Boston affidavit does not fall within the examples described in the Horton memorandum, this memorandum is not exhaustive and does not preclude reliance on other evidence. Heirs of Linda Anelon, 101 IBLA 333, 337 (1988).

Case law makes clear that a presumption exists that mail properly addressed, stamped, and deposited in an appropriate receptacle is duly delivered. Donald E. Jordan, 35 IBLA 290, 294 (1978). That such mail "reached its destination at the regular time, and was received by the per-son to whom it was addressed" is within the presumption. Rosenthal v. Walker, 111 U.S. 185, 193 (1884); Legille v. Dann, 544 F.2d 1, 5 (D.C. Cir. 1976). The fact that application AA-6714 bears BIA's certification is evidence that the application was received by BIA, an agency of the Department. The evidence of mailing, coupled with the presumption of receipt in the normal course, is supportive of a finding that the application was timely filed.

The cases are clear that BIA did not consistently datestamp arriving applications. See Myrtle Jaycox, 64 IBLA 97, 99 n.2 (1982). Deposition testimony of Audrey Tuck, offered by Sanford, confirms that a datestamp was not consistently used by BIA when an "avalanche" of applications began arriving in October 1970. 2/ Thus, the lack of a BIA datestamp does not rebut the existence of a timely filing.

The record supports a finding that Boston mailed application AA-6714 early in 1971 and that it was timely received, albeit not datestamped, by BIA well prior to the deadline. Supporting this conclusion is the presence on the application of a legal description of the allotment parcel customarily completed by BIA. See Nora L. Sanford (On Reconsideration), 63 IBLA 335, 337 (1982). Sanford's parcel was described by metes and bounds, a method requiring considerable detail. Further evidence is offered by the fact that BIA, despite the great number of applications filed near the deadline, certified Sanford as a qualified Native only 4 days after the deadline.

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2/ Answer of Appellee Mary Sanford, Feb. 3, 1992, Exh. C at 15. Appellant objects to receipt of this deposition in evidence on the ground that it was not a party to the proceeding at which the deposition was taken and hence was not present to participate in the deposition. While the lack of opportunity to cross examine the deponent is a valid consideration in assessing the weight of the evidence, we reject appellant's contention that the deposition must be rejected on this basis.

The State requests that the Board order an evidentiary hearing if it determines that an issue of fact exists regarding the timeliness of application AA-6714. It is the policy of this Board to order such a hearing when an issue of material fact exists, but we can find no useful purpose for a hearing in the instant case. Although appellant contends that application AA-6714 was untimely, its basis for so concluding is the presence of BLM's datestamp on the front of the application indicating receipt on December 27, 1971. No party disputes that BLM (as opposed to BIA) did not receive the application prior to the deadline, and no party disputes the fact that BIA did not indicate the date of its receipt of the application. To convene a hearing to adduce evidence as to such facts is to engage in an exercise in futility. The State's request for hearing is not accompanied by an offer of proof, and it is hereby denied in the absence of sufficient justification.

Addressing the merits of BLM's decision holding right-of-way A-067674 null and void in part, the State points out that this right-of-way was granted on July 26, 1966, for "public lands" described therein subject to "all valid rights existing on the date of the grant." Public domain lands are defined in the grant to include lands "reserved or withdrawn for specific purposes, entered, selected, occupied and/or settled, and leased," appellant notes.

The State contends that as of July 26, 1966, Sanford had no valid existing rights. Even assuming that she commenced use and occupancy prior to this date, appellant argues, Sanford's claim to the land was inchoate and nonvested at this critical date. This conclusion follows because Sanford had yet to file a Native allotment application and because a mere preference right did not afford any protection against grants by the United States for public purposes, the State contends.

The State takes issue with the finding of BLM that the preference right to a Native allotment gained upon filing an application after completion of the requisite use and occupancy related back to the date of initial occupancy shown on the allotment application to defeat an intervening right-of-way grant. In particular, appellant challenges our decision in Golden Valley Electric Association (On Reconsideration), 98 IBLA 203 (1987) [GVEA (On Recon.)], and our reliance on the decisions in State of Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315 (D. Alaska 1985), Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), and Schumacher v. State of Washington, 33 L.D. 454 (1905), cited by the Board. The State contends that under the Act of February 8, 1887, 24 Stat. 388, involved in the Schumacher case, Indian occupancy caused the land to be appropriated and unavailable for disposition by the United States. This is asserted to be distinguishable from the Native Allotment Act where mere occupancy without the filing of an application does not establish a valid existing right. Further, it is noted that the claim of the State of Washington in Schumacher was made subject to the claims of settlers by terms of the authorizing statute. The Aguilar case is distinguished by appellant on the ground that the State in that case was in the position of a conflicting entryman in that the Statehood Act required that the land selected be vacant.

The State further argues that legislative approval of application AA-6714 by ANILCA does not preclude inquiry into the sufficiency of Sanford's use and occupancy of lands within right-of-way A-067674. Gross unfairness would result if appellant is required to have protested application AA-6714 within the 180-day period provided by section 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1988), appellant charges. During the protest period, right-of-way A-067674 was a valid existing right, the State argues, and section 905(a)(1) expressly made legislative approval "subject to valid existing rights." Moreover, the Board has previously acknowledged in Ahtna, Inc., 100 IBLA 7, 15 (1987), that there is "nothing in the record which shows [Sanford's] open and notorious use and occupancy" of allotment AA-6714 prior to the filing and approval of material source A-067674 (Appellant's Reply to Answer of BLM, Mar. 9, 1992, at 26). <sup>3/</sup>

The decision of BLM in this case was expressly premised on this Board's decision in State of Alaska, 110 IBLA 224 (1989). <sup>4/</sup> In that case, Native use and occupancy began in 1938, well prior to the State's receipt in 1966 of rights-of-way issued pursuant to 23 U.S.C. § 317 (1988). Native allotment applications were filed in 1967 and 1968. As here, the State urged that the Native allotment should be made subject to the rights-of-way or, in the alternative, that a hearing be ordered to determine whether Native use and occupancy was sufficiently open and notorious to defeat the State's rights-of-way. The analysis in State of Alaska and the BLM decision in the instant appeal rely upon the concept of relation back. Upon a Native's qualifying use and occupancy and the timely filing of a Native allotment application, a preference right to the lands so used and occupied vests in the Native. United States v. Flynn, 53 IBLA 208, 234, 88 I.D. 373, 387 (1981); see GVEA (On Recon.), 98 IBLA at 205. Once the preference right to an allotment vests, that right relates back to the initiation of occupancy and takes precedence over competing applications filed prior to the allotment application. State of Alaska, 110 IBLA at 227.

The Board's decision in State of Alaska went further than prior Board decisions. In holding that Native rights related back to the commencement of use and occupancy to take precedence over applications filed prior to the Native allotment application, both Flynn and GVEA (On Recon.) found it essential "that acts of appropriation occur which would disclose to an observer on the ground that the land was under active development or use." United States v. Flynn, *supra* at 236-37, 88 I.D. at 389; GVEA (On Recon.), 98 IBLA at 206 ("open and notorious use and occupancy of the land prior to the right-of-way grant"). In State of Alaska we held that the legislative approval by section 905 of ANILCA of Native allotments pending before the

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<sup>3/</sup> The Ahtna case, in which all the parties to the present appeal participated, involved the question of the proper disposition of funds escrowed from the sale of gravel excavated from an extension (Pit 18) of the material site right-of-way (A-067674) at issue in this appeal.

<sup>4/</sup> Appeal dismissed, State of Alaska v. Lujan, Civ. No. F90-006 (D. Alaska May 18, 1993); appeal filed, No. 93-35684 (9th Cir. July 16, 1993).

Department on or before December 2, 1980, barred any further adjudication of the sufficiency of the allotment applicant's use and occupancy of the land to preclude issuance of a right-of-way applied for after initiation of Native use of the lands in the allotment. 110 IBLA at 228-229. On this rationale, we affirmed cancellation of the right-of-way to the extent of the conflict with the Native allotment.

[2, 3] We decline the invitation to reexamine our holdings in State of Alaska and GVEA (On Recon.) because we find those cases to be distinguishable. The rights-of-way in State of Alaska were secured for a highway bridge and for a power transmission line. The right-of-way in GVEA (On Recon.) was similarly issued for a power transmission line. In contrast, the State right-of-way (A-067674) in the present case was issued for a mineral material site for extraction of gravel for construction of the Tok highway. See Ahtna, Inc., *supra* at 8-9. In that case we noted that the Alaska Native Allotment Act expressly limited Native allotments to "nonmineral" land. Act of May 17, 1906, ch. 2469, 34 Stat. 197; see 43 CFR 2561.0-3. In the Ahtna case we carefully examined the question of whether lands embracing deposits of gravel are properly deemed mineral in character:

[W]e must conclude that prior to passage of section 905(a)(3) of ANILCA in 1980, 43 U.S.C. § 1634(a)(3) (1982), lands valuable for gravel were considered to be mineral lands not available for disposition under the Alaska Native allotment Act and the regulations promulgated pursuant thereto. A BLM mineral report dated July 5, 1973, prepared by H. L. Edwards, a mining engineer, appearing in the Native allotment case file, concluded that the southern portion of the Native allotment, including land embraced in the State's material site and the subsequent Pit 18 extension, was mineral in character. The report concluded that these lands "possess mineral materials in such quantity and quality as to be designated mineral in character" and, further, that a "market exists now for the material." Mineral Report at p. 4. This report was the basis for the December 15, 1975, notice to Sanford's counsel advising that a portion of her Native allotment claim had been determined to be mineral in character due to the presence of gravel.

Thus, prior to the passage of ANILCA in 1980, Sanford would not have been able to obtain an allotment for the land embracing the gravel deposit. \* \* \* Sanford's Native allotment application was subject to rejection for the lands embraced in the gravel deposit as she was advised in the December 15, 1975, notice for BLM. If adjudication had proceeded in its proper sequence, Sanford's application would have been rejected as to the gravel lands prior to the material sale to the State.

100 IBLA at 17-18.

Accordingly, we find that the allotment applicant's preference right to an allotment cannot as a matter of law relate back to the initiation

of use and occupancy with respect to the mineral land located within the State's mineral material site right-of-way. With respect to statutory approval of the allotment pursuant to section 905(a)(1) of ANILCA, such approval is subject to "valid existing rights." While section 905(a)(3) of ANILCA defined "nonmineral" lands to include lands valuable for gravel, this provision did not retroactively invalidate the material site right-of-way. Consequently, there is no basis for finding that the State material site right-of-way issued in 1966 was preempted and is null and void. 5/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge

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5/ We note that certain procedural motions have been filed late in these proceedings regarding efforts to strike certain pleadings filed on behalf of parties. Although the Board does not generally "strike" pleadings filed in cases and, hence, the motion is denied, we have considered the objection as a motion in opposition to the pleading.